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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

LOUIS VINSTON,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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QUESTIONS PRESENTED

I. WHETHER AN IN-COURT IDENTIFICATION BASED IN PART UPON A LINEUP CONFRONTATION PROCEDURE OCCURRING AFTER FORMAL ARREST PURSUANT TO WARRANT BUT WITHOUT PETITIONER HAVING BENEFIT OF COUNSEL MUST BE SUPPRESSED AS VIOLATIVE OF THE SIXTH AND FOURTEENTH AMENDMENTS AND THIS COURT'S RULE IN *UNITED STATES v. WADE*, 388 U.S. 218 (1967).

II. WHETHER THE WARRANTLESS SEIZURE OF AN AUTOMOBILE, AND THE SUBSEQUENT SEARCH OF THAT AUTOMOBILE PURSUANT TO WARRANT, BASED UPON A DEFECTIVE AFFIDAVIT, VIOLATED PETITIONER'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS THUS REQUIRING SUPPRESSION OF ANY EVIDENCE OBTAINED DURING THE SEARCH.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Petitioner, Louis Vinston [hereafter Vinston], a prisoner serving a sentence of fifty years in the Arkansas Department of Correction, petitions for a writ of certiorari to review the affirmance of his conviction and sentence by the Supreme Court of Arkansas.

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas affirming Vinston's conviction and sentence is reported at *Vinston v. State*, —— Ark. ——, 625 S.W.2d 533 (December 21, 1981). A copy of the opinion is included in the Appendix.

JURISDICTION

The opinion of the Supreme Court of Arkansas was rendered on December 21, 1981. The Court's jurisdiction is invoked under 28 U.S.C. §1257(3), with Vinston asserting

here, and having asserted below, a deprivation of rights secured by the Constitution of the United States made applicable to the States through the Due Process Clause of the Fourteenth Amendment.

Vinston notes that counsel on appeal was to file a petition for writ of certiorari to this Court. No such petition was filed in the normal time for consideration of such a writ. Vinston obtained new counsel to complete this petition. Since this is a criminal appeal the time limit is not jurisdictional and Vinston would ask that this Court exercise its discretion and consider this petition on its merits. See *Sanabria v. United States,* 437 U.S. 43 (1978); *Schact v. United States,* 398 U.S. 58 (1970); *Taglianetti v. United States,* 394 U.S. 316 (1969).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment, United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Fourteenth Amendment, Section 1, United States Constitution:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

Vinston was convicted of aggravated robbery and theft of property, as an habitual offender, and was sentenced to serve a term of fifty years in the Arkansas Department of Correction. The information filed against him in November, 1980, alleged that Vinston had committed an armed robbery, and resulting theft, of a jewelry store in Little Rock, Arkansas, on October 30, 1980.

Vinston was arrested on October 31, 1980, at a garage that he owned with another man. The arrest was based in part upon the location of an automobile that allegedly bore the same license plate number as Vinston's. The arrest, made pursuant to an arrest warrant, was also based in part upon a tenative identification of Vinston by the victims of the robbery.

After being arrested and taken into custody Vinston was placed in a lineup identification procedure. He had requested counsel and had refused to sign a waiver of counsel at the presentation. Besides the victims, members of the Little Rock Police Department, a deputy prosecuting attorney, and defense counsel for another suspect were present at the lineup procedure. It was pointed out that during the lineup Vinston was apparently wearing the same shirt that he had on in the photograph used by the police for an earlier photographic array.

At the time of Vinston's arrest the police noted that an automobile matching the description of the one that was supposed to have been used in the robbery was at the garage that Vinston co-owned. A Little Rock Police Detective, acting on his own authority, took the keys from Vinston, seized the automobile, and had it towed to a police lot. Later, an affidavit was filed seeking a search warrant and a search of the car was conducted pursuant to warrant. Several items seized during this search were introduced into evidence against Vinston.

The affidavit for the search warrant, based upon double hearsay and never stating a reason why the affiant believed that goods from the robbery were in the car, was deemed sufficient by the local magistrate and a warrant was issued.

Vinston challenged the lineup identification procedure and the search of the automobile. A general motion to suppress the evidence was filed on his behalf by trial counsel, and a full evidentiary hearing on all issues was held prior to trial. These issues were raised on appeal of the Supreme Court of Arkansas and were addressed by that Court in its opinion.

The Supreme Court of Arkansas concluded that there was no problem with the lineup identification procedure. Further, it concluded, over two dissents, that the warrantless seizure of the automobile did not invalidate the later search pursuant to warrant. The Court also had no problems with the sufficiency of the affidavit for the warrant. From the affirmance of the conviction and sentence, Vinston seeks a writ of certiorari from this Court to review the decision of the lower court.

REASONS FOR GRANTING THE WRIT

1. THE IN-COURT IDENTIFICATION OF PETITIONER WAS MADE IN VIOLATION OF HIS RIGHTS TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND SHOULD HAVE BEEN SUPPRESSED.

Vinston was identified by the victims of the robbery as one of the assailants. This identification was based in part upon a lineup confrontation that occurred after Vinston's formal arrest. Despite his request for counsel, and his refusal to sign a waiver of counsel, Vinston was forced to stand in the lineup procedure.

An attorney present at the procedure for another defendant noted that some of the people viewing the lineup had to see it on more than one occasion. There was some testimony that suggestive methods were used to achieve an identification. For example, it was shown that the shirt Vinston wore in the lineup was the same, or very similar to, the one that he was wearing in a mug shot that was earlier shown to the victims. (See R. 45 as compared to R. 54). Further, when one of the victims commented that Vinston's complexion was not the same in the photograph as the person he remembered to have committed the robbery, a police detective assured him that that was not unusual. (R. 84)

The victims were asked to view two lineups. One for black people and one for white people. One of the victims picked out a white person also but that person was released because it was not the right person. (R. 113) The attorney that was present at the lineup for his white client noted that upon that person being picked, the police commented

that the victim had made a bad choice. (R. 130) The trial court credited this testimony. (R. 133)

In making its ruling denying the motion to suppress, the trial court indicated at first that there was no suggestiveness in the procedure. Then the court expressed doubts and went on to say:

> THE COURT: There may have been some suspicion cast on this entire lineup procedure, but I do think that the preponderance of the evidence weighs in favor of the State in that it weighs in favor of the proposition that the lineup was not impermissibly suggestive. (R. 135)

The trial court, then, seems to say that there was *some* suggestiveness in the procedure but that after the fact at a hearing on a motion to suppress it could not state that it was so suggestive as to warrant suppression of the in-court identification by the victims.

The attorney testified that before going into the lineup the victims were told to pay attention to various things. For instance, the height, posture, or *clothing* of the people in the lineup. (R. 94) When he suggested that the method in which the lineup was being conducted (as to his white client) was not fair, he got into an argument with the police detective conducting the lineup. (R. 99) Again, it is remembered that the trial court totally credited this testimony.

This procedure was not an investigative procedure only. This lineup occurred *after* Vinston was formally under arrest pursuant to warrant. (R. 149) The arrest warrant was based upon a "conditional," identification of Vinston's photograph by one of the victims. (R. 149)

Although no formal information was yet filed, this arrest was a formal arrest. The procedure became adversarial in nature and a confrontation occurred. A deputy prosecuting attorney was present observing the procedure. (R. 93)

Vinston did not have counsel at this lineup. The right to counsel is the right to have counsel present at critical stages of a criminal prosecution. The question presented in this petition is whether the right to counsel attaches during a post-arrest, pre-indictment lineup procedure? If so, the question becomes whether a lineup conducted under those circumstances is unconstitutional, and the results of that lineup must be suppressed in evidence? The ultimate question, then, is whether the identification of Vinston by the victims of this robbery should have been precluded from presentation to the jury.

It is clear that there is a Sixth Amendment right to counsel at a lineup procedure that occurs after a formal charge has been filed in a criminal case. At that time any actions that occur directly involving the accused in a confrontation are critical stages of the prosecution. *United States v. Wade*, 388 U.S. 218 (1967). This rule has been applied to the States through the Fourteenth Amendment Due Process Clause. *Gilbert v. California*, 388 U.S. 263 (1967).

Of course there can be a waiver of counsel in any situation if it is knowingly and intelligently made. The facts in this case, however, indicate that no such waiver occurred. [R. 41 (rights waiver form)] Or, as one of the police detectives testified, "He (Vinston) did not want to sign anything." (R. 27)

The Court has not definitely stated that the Wade/Gilbert rule applies after formal arrest but before formal indictment. It has held that there is no constitutional right to counsel during mere investigative stages of prosecutions. See *Simmons v. United States*, 390 U.S. 377 (1968). But, in this case a formal arrest had been made pursuant to warrant.

Vinston was not being arrested for investigative purposes. He was under formal arrest pursuant to a warrant issued in part upon the conditional identification of his photograph by the victims of this offense. Due to the confused testimony in this record and the indication by the trial court that there was some suggestiveness, it is clear why this Court has indicated that a right to counsel should attach to such situations.

In *Moore v. Illinois*, 434 U.S. 220 (1977), the Court recognized that the right to counsel at a lineup procedure attached at least during the preliminary hearing stage. The Court rejected the argument that since the preliminary hearing was to determine if there were probable cause to hold the defendant, the right to counsel at such a proceeding when a victim shows up and makes an identification is not critical.

Vinston argues that this is virtually the same situation. Hence, the rule in *Moore v. Illinois* should be extended to proceedings after formal arrest. Although other people were in the lineup procedure, this was an ultimate decision as to whether to maintain the charges against him. As was pointed out above, a second lineup was being held trying to identify a white offender (and the one chosen by the eyewitnesses was released).

Because of the uncounseled identification procedure, Vinston was effectively denied the opportunity to fully develop what transpired at the "suspicious," lineup in this case. It should be remembered, however, that until this lineup was conducted, there was only a conditional identification of Vinston. Because the police did not secure counsel for Vinston and forced him to proceed without the benefit of counsel, then the lineup identification should have been suppressed.

Further, the identification of Vinston by the victims of this offense should not have been permitted at trial. *United States v. Wade, supra; Moore v. Illinois, supra.*

This Court should grant the petition for certiorari in this case. The Court should rule that after a formal arrest pursuant to warrant any lineup confrontations to which the accused is a party must be counseled (absent a waiver of counsel), or identifications will be suppressed. The exclusion of such evidence should date back not only to the lineup procedure, but should include any identification testimony of the defendant by the victims.

II. THE SEIZURE OF PETITIONER'S AUTOMOBILE WAS IN VIOLATION OF THE FOURTH AMENDMENT, AND THE SUBSEQUENT WARRANT TO SEARCH THE CAR WAS BASED UPON A DEFECTIVE AFFIDAVIT, THUS THE FRUITS OF THE SEIZURE AND SEARCH SHOULD BE SUPPRESSED.

The Fourth Amendment protects citizens from unreasonable searches and seizures. If a violation occurs then evidence that is seized pursuant to the search or seizure is

suppressed. This protection against unreasonable government intrusion is applied to the States through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961).

An exception to the warrant requirement of the Fourth/Fourteenth Amendment has developed in the case of automobiles. The theory is that if a search of an automobile is not made then evidence may be lost or destroyed. Of course, the main rationale for the warrantless search of an automobile is that it is a search incident to a lawful arrest. See *Chambers v. Maroney*, 399 U.S. 42 (1970); *Cady v. Dombrowski*, 413 U.S. 433 (1973); *Cardwell v. Lewis*, 417 U.S. 583 (1974).

However, the seizure of an automobile, and the subsequent search of that automobile, are not automatically permitted just because the defendant is lawfully under arrest. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). This case presents a problem similar to *Coolidge* in that the car was seized pursuant to Vinston's arrest. However, Vinston was not in the car at the time of the seizure and there was no indication that he was going to drive it away.

The case is also distinguishable from *Cardwell v. Lewis*, *supra*, since Vinston did not ask the police to take care of his automobile. In fact, Vinston was told that the police were going to seize his car.

Since the police did not have a warrant, since Vinston was in custody, and since the car was on his private property (Vinston was arrested at a garage he co-owned), it is clear that the seizure of the automobile was constitutionally defective. The evidence later seized, then, should have been suppressed because of this illegal police activity.

Vinston first notes that the search in this case was of the internal compartments of the car. It is not like *Cardwell v. Lewis, supra,* where the search was of the exterior of the car. Hence, the "plain view," analogy of that case does not apply here.

Further, it cannot be argued that this was merely an inventory search for the protection of Vinston and the police. *South Dakota v. Opperman,* 428 U.S. 364 (1976). Indeed, since the police forced a lock open in this case it is clear that the State was not interested in protecting property.

The seizure was not incident to arrest. The search was not incident to arrest. The car was not in the immediate control of Vinston, nor did any exigent circumstances exist since the car was parked at a private garage. If the court rejects a *per se* rule of exclusion because of the initial police misconduct, the question becomes whether the warrant was properly issued in this case.

The Fourth Amendment requires that a warrant be issued based upon probable cause. The affidavit in support of a search warrant must clearly show that the police have reason to believe its conclusion that illegal evidence could be found in the automobile.

Although an informant was used in this case, the informant can best be characterized as a citizen informant so questions of reliability are somewhat relaxed. See *United States v. Harris,* 403 U.S. 573 (1971). The affidavit in this case was prepared by a police officer and is to be given a common sense interpretation. *United States v. Ventresca,* 380 U.S. 102 (1964). Yet, the affidavit for a search warrant cannot state mere conclusions.

Here the affidavit in question (See Appendix at A-13-15) states that: (1) the police believe fruits of the robbery are in the car; (2) that Vinston was identified as one of the robbers; (3) that a car matching the description was seen at the scene of the robbery; (4) that Vinston was arrested and the car impounded. Yet, nowhere does the affidavit give any reason to believe that fruits of the robbery are in the car. Nor does it state that Vinston was seen getting into or out of the car with packages or other items that might be fruits of the robbery. Nor does it state any reason to believe that the car is involved in the robbery.

In short, the affidavit in this case states a mere conclusion without any supporting information. As such, it is defective on its face and should be quashed. The search pursuant to warrant must also be suppressed as violative of the Fourth and Fourteenth Amendments. See *Mapp v. Ohio, supra.*

In *Spinelli v. United States,* 393 U.S. 410 (1969), and *Aguilar v. Texas,* 378 U.S. 108 (1964), the Court stated that if an affidavit for a search warrant is defective, then the search pursuant to warrant is defective. The rationale is that if an affidavit states mere conclusions, as this one here, then a warrant issued pursuant to that affidavit is really not made by a neutral and detached magistrate but by the law enforcent officer.

This Court should grant certiorari, reaffirm the principle that affidavits for search warrants should be couched in more than conclusory terms, and suppress the fruits of this search. Further, the Court should take this opportunity to state that when one illegal act has occurred (here the seizure of the automobile), subsequent actions will not overcome the taint created by the illegality.

CONCLUSION

The petition for writ of certiorari to the Supreme Court of Arkansas should be granted, the decision of that court reversed on both counts, and the cause remanded for trial without the identification or the fruits of the illegal search. This Court should set this matter for oral argument on the issues set out above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas M. Carpenter, one of the counsel for petitioner herein, do hereby certify that a true and correct copy of the foregoing petition and the accompanying appendix have been served on opposing counsel this 4th day of June, 1982, by mailing, first class postage prepaid, copies of same to the Honorable Steve Clark, Office of the Attorney General, Justice Building, Little Rock, Arkansas 72201.

/s/ Thomas M. Carpenter